Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1999

ACCURACY IN MEDIA, INC.,

Petitioner,

v.

NATIONAL PARK SERVICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a Writ of Certiorari Should Issue to Resolve a Conflict With This Court's Decision That Only the Subject of an Agency Record Has a Privacy Interest in Preventing Its Dissemination?

II. Whether a Writ of Certiorari Should Issue to Settle the Important Question of Whether a Person's Privacy Interests Survive Death?

LIST OF PARTIES

Pursuant to S.Ct. Rule 29.6, the following is a list of parties and each corporate party's respective parent corporation and subsidiaries, if any.

Petitioner:

1. ACCURACY IN MEDIA, INC.
   - A. Parent Corporation: None
   - B. Subsidiaries: None
   - C. Affiliates: None

Respondents:

1. NATIONAL PARK SERVICE

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No.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The October 26, 1999 Opinion of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") that gives rise to this petition is reported at 194 F.3d 120 (D.C. Cir. 1999). It is reprinted in Appendix A hereto at App. 1-9. By an Order dated December 29, 1999, the D.C. Circuit denied a petition for rehearing en banc. This Order is reprinted in Appendix D at App. 12.

STATEMENT OF JURISDICTION

Petitioner, Accuracy in Media, Inc. ("AIM"), initiated this Freedom of Information Act ("FOIA") action in the U.S. District Court for the District of Columbia ("the District Court"). The District Court had federal question jurisdiction pursuant 5 U.S.C. 552(a)(4)(B). The District Court entered

final judgment adverse to AIM on November 13, 1998. AIM filed a Notice of Appeal from the District Court's judgment on November 23, 1998.

Appeal was taken to the D.C. Circuit pursuant to 28 U.S.C. § 1291. The D.C. Circuit affirmed on October 26, 1999. A timely petition for rehearing en banc was denied on December 29, 1999.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Writ of Certiorari is timely if filed within ninety (90) days of December 29, 1999, or by March 28, 2000.

STATUTE INVOLVED

FOIA, 5 U.S.C. § 552, states in part:

(a) Each agency shall make available to the public information as follows: . . .

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying - . . .

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records . . ..

(3)(A) Except with respect to the records made available under paragraph[] (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is

readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section. . . .

(b) This section does not apply to matters that are - . . .

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . ..

STATEMENT OF THE CASE

This case arises out of AIM's FOIA request of June 6, 1997 to the National Park Service ("the NPS") for documents concerning the death of Deputy White House Counsel Vincent W. Foster. On September 12, 1997, AIM filed a complaint for declaratory and injunctive relief. On that same day, the NPS released responsive documents to AIM. Thereafter, NPS released further documents to AIM, but withheld others in whole and in part. The NPS filed its answer on or about October 16, 1997.

The withheld documents at issue here are photographs of Mr. Foster's body at Fort Marcy Park, where the body was discovered, and at the autopsy. The NPS claims that the release of these photographs would violate the privacy rights of Mr. Foster's family members. Consequently, the NPS has purported to withhold the photographs from production under Exemption 7(C) of the FOIA, which excludes information compiled for law enforcement purposes where the release of the information could constitute and unwarranted invasion of personal privacy. AIM contends that the family members have no privacy interest in the photographs because the family members are not subjects of the photographs and are not depicted in them in any way. AIM further contends that even if there were such a privacy interest, it would be outweighed by the public's interest in disclosure of the

photographs. Mr. Foster was a Deputy White House Counsel whose death was investigated by the United States Park Police, the Federal Bureau of Investigation ("FBI"), the White House, the Senate, and Independent Counsels Robert Fiske and Kenneth Starr. AIM asserts that numerous and significant factual contradictions exist between official government reports on Mr. Foster's death and the investigative record, and that the public has a substantial interest in the photographs of Mr. Foster's body, because they might illuminate whether the government properly investigated the untimely death of this high-level White House employee.

The NPS filed a motion for summary judgment on April 13, 1998. AIM filed its opposition thereto on May 20, 1998. The NPS filed its reply on June 29, 1998. The District Court filed its Memorandum Opinion granting the NPS's motion on November 13, 1998. (App. E.) AIM filed its Notice of Appeal on November 23, 1998.

The D.C. Circuit affirmed on October 26, 1998. (App. A.) AIM filed a timely petition for rehearing en banc. The D.C. Circuit denied AIM's petition on December 29, 1999. (App. D.)

REASONS FOR GRANTING THE WRIT

I. A WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE A CONFLICT WITH THIS COURT'S DECISION THAT ONLY THE SUBJECT OF AN AGENCY RECORD HAS A PRIVACY INTEREST IN PREVENTING ITS DISSEMINATION.

This Court has plainly stated that underlying the Freedom of Information Act, 5 U.S.C. § 552, is "a general philosophy of *full* agency disclosure." *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 754 (1989) (quotations and citations omitted) (emphasis added) ("*Reporters Committee*"). In addition to a general philosophy of *full* agency disclosure, the central purpose of the FOIA is to keep government accountable to the people. As this Court has stated, "[t]he basic purpose of FOIA is to ensure an informed citizenry, *vital to the functioning of a democratic society*, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (emphasis added); *see also Hale v. Department of Justice*, 973 F.2d 894, 898 (10th Cir. 1992). To this end, courts have held that FOIA exemptions should be construed narrowly. *See, e.g., Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 984 (9th Cir. 1985).

In *Accuracy in Media, Inc. v. Nat'l Park Service*, 194 F.3d 120 (D.C. Cir. 1999), however, the D.C. Circuit broadly construed FOIA's 7(C) exemption regarding privacy interests in agency records compiled for law enforcement purposes, holding that persons other than the subject of the record, such as the subject's surviving kin, have protected privacy interests as well. App. 4. In fact, it did so in contravention of clear language in this Court's decision in *Reporters Committee* that privacy interests belong to the subject of an agency record only: "To begin with, both the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person." *Reporters Committee*, 489 U.S. at 763. The D.C. Circuit

even acknowledged this and other language from *Reporters Committee* demonstrating that privacy interests are personal to the subject of an agency record: "[Petitioner] rightly points out that in [*Reporters Committee*], the Supreme Court recited a number of definitions of privacy under which only the subject could hold the interest." App. 4. Instead of adhering to this Court's clear language in *Reporters Committee*, the D.C. Circuit misconstrued dicta in that decision -- a definition of privacy from Webster's Third New International Dictionary, actually -- stating:

> In text . . . the Court used *a possibly broader notion*, speaking of information as being private if 'intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public.' [*Reporters Committee*] at 763-64. For photos of a gunshot victim, the deceased's next of kin *might* well constitute such a group.

App. 4 (emphasis added). This Court's use of Webster's definition of privacy in *Reporters Committee* did not, however, expand the notion of privacy interests to include persons other than the subject of the agency record. Rather, this Court merely recognized the reality that sometimes information in which a person has a privacy interest may be accessible to a particular person, or even group of persons, and nonetheless remain "private." *Reporters Committee*, 489 U.S. 763-64. Because the D.C. Circuit's decision expands exemption 7(C) to include the privacy interests of next of kin, it is in conflict with *Reporters Committee*, and a writ of certiorari must issue to resolve this conflict.

II. A WRIT OF CERTIORARI SHOULD ISSUE TO SETTLE THE IMPORTANT QUESTION OF WHETHER A PERSON'S PRIVACY INTERESTS SURVIVE DEATH.

In the alternative, Petitioners also submit that a writ of *certiorari* must issue to allow this Court to settle the important question of whether a person's privacy interests under exemption 7(c) survive death. The D.C. Circuit cited

its decision in *Campbell v. United States Dep't of Justice*, 164 F.3d 20 (D.C. Cir. 1998), which held that the protection of privacy does not end upon the death *of the subject*:

> [O]ur circuit has squarely rejected the proposition that FOIA's protection of personal privacy ends upon the death of the individual depicted. . . the terms of our remand clearly depended on our view that the 7(C) privacy interest survives the death of the subject.

App. 5. However, the D.C. Circuit recognized that it did *not*, in *Campbell*, resolve "the scope and weight" of any surviving privacy interests, but still declined in this case to explore "whether the interest belongs to "living close survivors (in which case it *might* end at their deaths), *or alternatively* may inhere posthumously in the subject himself (in which case it would seem to be of indefinite duration), or both." App. 5-6 (emphasis added). Rather, it merely stated that "obviously [Petitioner] cannot deny the powerful sense of invasion bound to be aroused in close survivors by wanton publication of gruesome details of death by violence." App. 5.

Petitioner respectfully submits that this Court should settle the important question of whether the privacy interests of a individual survive his or her death, and, if so, decide to whom those interests inure and delineate the proper scope of those interests. Only when these important questions have been settled can courts strike the necessary and proper balance between protecting personal privacy and "ensur[ing] an informed citizenry," in determining whether a 7(C) exemption should apply. *Robbins Tire & Rubber Co.*, 437 U.S. at 242; *see also Hale*, 973 F.2d 898.

It is particularly important that a proper balance be struck in this case given the numerous questions about the official investigations of Mr. Foster's death that have never been resolved. As the D.C. Circuit stated in another matter:

> [T]he public may have an interest in knowing that a government investigation itself is comprehensive,

> that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner.

Stern v. FBI, 737 F.2d 84, 92 (D.C. Cir. 1984).

Here, the agency's investigation has been shown to be neither comprehensive nor accurate, and yet the photographs, in which the public has an enormous interest, have been withheld based on undefined privacy interests. Petitioner demonstrated below that:

- Both Independent Counsels Fiske and Starr concluded that the only gunshot suffered by Mr. Foster entered through the inside of his mouth and exited out the back of his head. Yet, there is much controversy about the nature of Mr. Foster's wounds. The only doctor to view Mr. Foster's body in the park where it was found, wrote a report that was largely ignored by Fiske and Starr.

- That report said there was a *neck* wound, and at least one paramedic also reported seeing a neck wound. The official autopsy report and Independent Counsels Fiske and Starr found there was *no* neck wound.

- An FBI memo to the Director of the FBI said there was *no exit wound* while the official autopsy report and Fiske and Starr said that there *was* an exit wound in the back of Mr. Foster's head. Starr and Fiske ignored this FBI memo, and the government has refused to explain all the facts about the creation, internal reaction to, and suppression of the FBI memo.

- The report of Dr. Haut, the only medical doctor to examine Mr. Foster's body at Fort Marcy Park, appears to have been improperly altered, and the Office of Independent Counsel relied exclusively on the apparently altered portion of Dr. Haut's report.

- The autopsy improperly began before the Park Police arrived, thus preventing the police from seeing crucial evidence of Mr. Foster's wounds, namely to his tongue and parts of his soft pallet. The Office of Independent Counsel failed to tell the public that the police were improperly prevented from seeing this crucial part of the autopsy.

- Key photographs of the crime scene and body are missing without legitimate explanation.

- The lead Park Police officer on the scene testified that he saw a "pool of blood under [Mr. Foster's] head, gun in his right hand, appeared to be a .38 caliber revolver, no sign of a struggle, *no other obvious signs of trauma to the body*." Park Police Officer John Rolla wrote in his report on the night of the death that, "[t]here was no blood spatter on the plants or trees surrounding decedent's head." Rolla testified he did not observe any "blowout" from the alleged bullet exit wound. An FBI report of its interview of Dr. Haut, who was present at the body site, says "no blood was recalled on the vegetation around the body." If the photographs at issue show the lack of physical damage described by Officer Rolla and Dr. Haut, then they constitute evidence against the firing of a .38 caliber high velocity revolver bullet into the mouth, thereby contradicting the official government story.

See, e.g., Opening Brief of Appellant at 20-31; Reply Brief at 10-12.

If, for example, the photographs at issue show a neck wound that the government says did not exist, then the public has an obvious interest in the disclosure of that important fact, because it is a reflection on whether the government's investigation into Mr. Foster's death was comprehensive and accurate. *See Stern*, 737 F.2d at 92. The photographs of Mr. Foster's body are thus crucial to the public's learning the truth

about the government's investigation into the death of this high-level White House official.

CONCLUSION

Before any court can strike the proper balance between the public's obviously strong interest in the disclosure of these photographs and any privacy interests that may have survived Mr. Foster's death, or that belong to his family members, those privacy interest must be properly defined. Yet the D.C. Circuit, in giving preeminence to whatever privacy interests may be at stake, admitted "[i]t is true that we have not said much by way of explanation" in this regard. App. 5. A writ of certiorari must issue to resolve the conflict between the D.C. Circuit's decision and this Court's decision in *Reporters Committee*, as well as to answer these important questions.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 4, 1999 Decided October 26, 1999

No. 98-5535

ACCURACY IN MEDIA. INC.,

APPELLANT

V.

NATIONAL PARK SERVICE,

APPELLEE

Appeal from the United States District Court.
for the District of Columbia
(No. 97cv02109)

Larry E. Klayman argued the cause for appellant. *Brett M. Wood* and *Allan J. Favish* were on the briefs.

Robert M. Loeb, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief were *David W. Ogden,* Acting Assistant Attorney General, *Leonard Schaitman,* Attorney, and *Wilma A. Lewis,* U.S. Attorney.

Before: EDWARDS, *Chief Judge,* WALD and WILLIAMS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

WILLIAMS, *Circuit Judge:* Accuracy in Media, Inc. ("AIM") applied under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), for photos of the body of the late Deputy White House counsel Vincent W. Foster, Jr., taken at the scene of his death and at the autopsy (as well as other documents about which there is no longer any dispute). The National Park Service, custodian of the documents because the United States Park Police conducted the initial investigation, resisted disclosure, invoking FOIA exemption 7(C), 5 U.S.C § 552(b)(7)(C), which shelters records compiled for law enforcement purposes if their production would "constitute an unwarranted invasion of personal privacy." The district court granted summary judgment for the Park Service. The first question is whether, when the subject of a document has himself died, the personal privacy protected by 7(C) may include interests of the subject's surviving kin or posthumous privacy interests of the subject himself. If so, then the question arises whether AIM has met the "balancing" test under 7(C) by advancing "compelling evidence" of illegal government activity and of the need for the photos to confirm or refute that evidence. See *SafeCard Services, Inc. v. SEC,* 926 F.2d 1197, 1205-06 (D.C. Cir. 1991). We have already held that the protected privacy interests do extend beyond the interests of a document's subject while alive, see *Campbell v. U.S. Department of Justice,* 164 F.3d 20, 33-34 (D.C. Cir. 1998), and we adhere to that view. Further, AIM's evidence does not satisfy the *SafeCard* standard. Accordingly, we affirm the district court.

* * *

At about six PM on July 20, 1993, a private citizen alerted two off-duty Park Service employees to a dead body in Ft. Marcy Park in suburban Northern Virginia. Their immediate 911 call summoned police and rescue personnel to the scene, where Foster lay dead with a .38 caliber revolver in his right hand and a gunshot wound to his head. The House and Senate launched inquiries into the death. See Summary Report by William F. Clinger, Jr., Ranking Republican,

Committee on Government Operations, U.S. House of Rep., on the Death of White House Deputy Counsel Vincent W. Foster, Jr. (Aug. 12, 1994); S. Rep. No. 103-433, 1034 Cong., 4 (1995). There were also two separate independent counsel inquiries. See Report on the Death of Vincent W. Foster, Jr., by the Office of Independent Counsel In re Madison Guaranty Savings and Loan Association (Oct. 10, 1997) ("Starr Report"); Report of the Independent Counsel Robert B. Fiske, Jr., In re Vincent W. Foster, Jr. (June 30, 1994). All of these inquiries concluded that Foster committed suicide. See Starr Report at 2, 7-8.

To support its 7(C) privacy claim for the photos, the Park Service presented the declaration of Sheila Foster Anthony, Foster's sister, who described how release of the photos would invade the privacy of the Foster family (including his widow and children) and would cause extreme emotional anguish. It also submitted a so-called *Vaughn* index[1] describing each of the responsive documents found and the basis for withholding or redacting the document.

AIM contested application of the privacy exemption on two grounds. First it argued that because only Foster's privacy was at stake, his death terminated any valid privacy interest. If that were so, the Park Service's exemption claim would automatically fail. In the alternative, AIM argued that it satisfied *SafeCard's* "compelling evidence" requirement, saying that "there is much controversy about the nature of Mr. Foster's wounds," and that "[tjhe photos of Mr. Foster's body are crucial for getting the truth." The district court rejected both theories.

* * *

Exemption 7(C) allows non-disclosure of "records or information compiled for law enforcement purposes" when such material "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C.

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[1] See *Vaughn v. Rosen*, 484 F.2d 820, 826-27 (D.C. Cir. 1973).

§ 552(b)(7)(C). AIM rightly points out that in *United States Dep't of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749 (1989), the Supreme Court recited a number of definitions of privacy under which only the subject could hold the interest. For example, it quoted A. Breckenridge, The Right to Privacy 1 (1970), defining it as "the individual's right to control dissemination of information about *himself."* 489 U.S. at 764 n.16 (emphasis added). In text, in fact, the Court used a possibly broader notion, speaking of information as being private if "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." *Id.* at 763-64. For photos of a gunshot victim, the deceased's next of kin might well constitute such a group.

But the primary weakness of AIM's reading of *Reporters Committee* is not so much that some of the quoted definitions are broader than those it has selected, but that the decision's focus was utterly removed from our current problem. At issue were "rap sheets," individualized collections of data on persons' arrests, charges and convictions. The government had theorized that there could be no privacy interest in information that was scattered through public courthouse files and accessible, in theory, to anyone ready to devote enough resources to the task. In advancing the scholarly and dictionary definitions exemplified above, the Court sought only to explain its rejection of this narrow theory of privacy, not to present a hermetically sealed definition of privacy.

Further, our circuit has squarely rejected the proposition that FOIA's protection of personal privacy ends upon the death of the individual depicted. In *Campbell v. United States Dept of Justice,* 164 F.3d 20 (D.C. Cir. 1998), a scholar researching the life of James Baldwin made a FOIA request for Baldwin's "FBI file." The FBI claimed some material was protected from disclosure under exemption 7(C). Campbell challenged this claim, arguing that exemption 7(C) does not "protect the privacy of people who are dead." *Id.* at 33. We responded:

> [D]eath clearly matters, as the deceased by definition cannot personally suffer the privacy-related injuries that may plague the living. A court balancing public interests in disclosure against privacy interests must therefore make a reasonable effort to account for the death of a person on whose behalf the FBI invokes exemption 7(C). The court must *also* account for the fact that certain reputation interests and family-related privacy expectations survive death. As was recently pointed out by the Supreme Court in *Swidler & Berlin v. United States,* 524 U.S. 399 (1998), the attorney-client privilege survives the death of the client, who "may be concerned about reputation, civil liability, or possible harm to friends or family."

Id. at 33-34 (emphasis added) (citations omitted). While we did not resolve "[the scope and weight of these interests" because the record in *Campbell* was underdeveloped, see *id.* at 34, the terms of our remand clearly depended on our view that the 7(C) privacy interest survives death of the subject.

The parties struggle over whether language in some of our prior cases, seeming to endorse either a posthumous privacy interest or a privacy interest held by the subject's survivors, is dictum or holding. See *New York Times Co. v. NASA,* 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc); *Badhwar v. United States Department of the Air Force,* 829 F.2d 182, 185-86 (D.C. Cir. 1987). We need not pursue that dispute: *Campbell* was an unequivocal holding, and the others at a minimum provide supporting dicta.

It is true that we have not said much by way of explanation. But obviously AIM cannot deny the powerful sense of invasion bound to be aroused in close survivors by wanton publication of gruesome details of death by violence. One has only to think of Lindbergh's rage at the photographer who pried open the coffin of his kidnapped son to photograph the remains and peddle the resulting photos. While law enforcement sometimes necessitates the display of such

ghoulish materials, there seems nothing unnatural in saying that the interest asserted against it by spouse, parents and children of the deceased is one of privacy—even though the holders of the interest are distinct from the individual portrayed. We need not here explore whether the interest belongs to living close survivors (in which case it might end at their deaths), or alternatively may inhere posthumously in the subject himself (in which case it would seem to be of indefinite duration), or both.

AIM quite rightly notes that exemption 7(C) protects against unwarranted "invasions" of privacy, not against grief per se. There is no grief exemption. It is the "invasion" that triggers a weighing of the public interest against the private harm inflicted, *NASA*, 920 F.2d at 1005, not the grief or any feeding frenzy of media coverage, even though the latter constitute the private harm. But the release of photos of the decedent at the scene of his death and autopsy qualifies as such an invasion.

* * *

To show that the invasion of privacy was not "unwarranted," AIM must show "compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [photos] is necessary in order to confirm or refute that evidence." *SafeCard*, 926 F.2d at 1205-06. AIM's theory is that known contradictions in the published materials are adequate evidence of government foul play, and that, because those contradictions relate to the nature of the bullet wounds, the photos would likely shed critical light.

Specifically, AIM relies on three statements about Foster's wounds that differ from the conclusion reached by the two congressional inquiries and the two independent counsels, namely, that Foster had an entrance wound in the mouth and an exit wound in the back of the head, which are consistent with suicide. First, a paramedic who was at the scene, reported the wound as an entrance wound at the neck. Second, a Dr. Donald Haut, of the Fairfax County medical

examiner's office, examined Foster at Ft. Marcy Park and filed a report that described Foster's wounds on one page as "perforating gunshot wound mouth-head" and on the next as "mouth to neck." Finally, an FBI memo states there was no exit wound at all.

We find AIM's evidence considerably below the threshold. The Starr Report characterizes the exit wound as three inches from the top of the head. Starr Report at 31. Depending on what one views as the "top" of the head, the discrepancy between this and assertions of a neck exit wound may be matters of characterization. Further, the paramedic, after reviewing photos (presumably ones belonging to the disputed set), admitted that he may have been mistaken about Foster having a neck wound. Starr Report at 34 n.77. Dr. Haut's report is internally inconsistent, with one assertion consistent with the later reports from Congress and the two independent counsels. AIM asserts that the consistent entry on Dr. Haut's report was the product of an alteration. On the photocopy that is part of our record, there does appear to be a deletion on Dr. Haut's typed report just before the word "head," so we cannot rule out AIM's speculation that "neck" had appeared but was deleted. Without more, however, the possibility that "neck" ever appeared in the now-empty space is hardly "compelling evidence" that any government actor has behaved illegally. At least while completing that part of the report, Dr. Haut presumably thought "head" correct. Finally, the FBI memo reporting that there was no exit wound is a puzzling document of unknown origin. But it merely purports to offer "preliminary results" and is datestamped "July 23, 1993," only three days after Foster died.

When multiple agencies and personnel converge on a complex scene and offer their hurried assessments of details, some variation among all the reports is hardly so shocking as to suggest illegality or deliberate government falsification. Nor does it suggest that the congressional or independent counsel inquiries got anything wrong regarding Foster's wounds. The Starr Report is altogether credible in its assertion

that the photos are "[s]ome of the best evidence" of the nature of Foster's wounds, Starr Report at 16, and those who have viewed them have concluded that Foster suffered an entrance wound in the mouth and an exit wound in the back of the head. The likelihood that the photos contradict the statements of all four investigating agencies seems remote. While we agree that falsification by the agencies would show government illegality—under the present facts, indeed, illegality on a massive scale—there is no persuasive evidence of such falsification, much less compelling evidence.

Two final issues: First, AIM contends that the district court should have at least inspected the photos in camera. We review its decision not to do so for abuse of discretion, *Spirko v. United States Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998), and have said that such review "may be particularly appropriate when either the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims or there is evidence of bad faith on the part of the agency." *Quinon v. FBI*, 86 F.3d 1222, 1227-28 (D.C. Cir. 1996). None of the evidentiary discrepancies is evidence of bad faith on the part of the Park Service. AIM suggests that the *Vaughn* index falls short in not revealing just how graphic each of the photos is, following up with the suggestion that in camera inspection might identify some photos tame enough to be released with little invasion of personal privacy. Given the subject, matter, we cannot imagine any photos that could both elucidate the true nature of Foster's wounds and yet not be disturbingly graphic. We find no abuse of discretion.

Second, AIM seeks further discovery on the theory that the Park Service has failed to search adequately for missing photos, handwritten notes, telephone records, and other documents. AIM's claim of need rests on highly speculative criticism of the Park Service's search. For example, it observes that type-written reports from those who attended the autopsy were quite detailed—so detailed, it says, that there must also be some handwritten notes because the attendees could not have typed or dictated the reports from

memory. But "[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." *SafeCard*, 926 F.2d at 1201. We find no abuse of the court's exercise of its discretion to manage the scope of discovery.

* * *

The decision of the district court is

Affirmed.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-5535 **September Term, 1999**

FILED
October 26 1999
CLERK

MANDATE
Issued: 1.7.00

Accuracy in Media, Inc.,

Appellant

v.

National Park Service,

Appellee

Appeal from the United States District Court
for the District of Columbia
(No. 97cv02109)

Before: EDWARDS, *Chief Judge*, WALD AND WILLIAMS, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in this cause is

hereby affirmed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk
By: /s/
Robert A. Booner
Deputy Clerk

Date: October 26, 1999

Opinion for the Court filed by Circuit Judge Williams.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-5535 **September Term, 1999**
97cv02109

FILED
Oct 26 1999
CLERK

Accuracy in Media,

Appellant

v.

National Park Service,

Appellee

ORDER

It is **ORDERED**, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
MaryAnne McMain
Deputy Clerk

APPENDIX D

United States Court of Appeals

For the District of Columbia Circuit

September Term, 1999

No. 98-5535 **97cv02109**

FILED
Dec 29 1999
CLERK

Accuracy in Media,

Appellant

v.

National Park Service,

Appellee

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: /s/
Robert A. Bonner
Deputy

Circuit Judges Sentelle and Garland did not participate in this matter.

APPENDIX E
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 97-2109

ACCURACY IN MEDIA, INC.,

Plaintiff,

v.

NATIONAL PARK SERVICE,

Defendant.

MEMORANDUM OPINION

This case is brought by Accuracy in Media, Inc. against the National Park Service (NPS) to compel NPS to disclose documents regarding the death of former Deputy White House counsel Vincent W. Foster, Jr. (Foster) pursuant to the Freedom of Information Act (FOIA or Act).[1] Defendant filed

[1] This case is similar to *Accuracy in Media, Inc. v. United States Secret Service*, Civ. Action No. 97-2108 (D.D.C. Apr. 16, 1998), which was heard by Judge Friedman. In that case, like the one before this Court, Plaintiff brought suit to gain access to documents under FOIA regarding Mr. Foster's death, challenged the government's invocation of Exemption 7(A) and requested *in camera* review. *Id.* at 1. Judge Friedman conducted *in camera* review on the basis that although no allegation of bad faith had been made against the government, the Court, like the plaintiff, had difficulty ascertaining from the categorizations of withheld material whether the government had properly withheld or redacted the requested information. *Id.* at 4. After conducting the review, which involved looking at only 14 pages of documents, Judge Friedman found that 2 pages of one document should be released because they were not relevant to the Office of Independent Counsel's investigation of the events

a Motion for Summary Judgment on the ground that the NPS disclosed to Plaintiff all information which is not exempt under the Act. After considering the submissions of both parties, the Court finds that there is no evidence that Defendant conducted its search for responsive documents in bad faith and therefore no grounds to find that Defendant improperly withheld information under the enumerated exemptions of the Freedom of Information Act. The Court also finds no basis to grant Plaintiff's requests for *in camera* review or further discovery in this case. Therefore, the Court will grant Defendant's Motion for Summary Judgment.

I. Background

This is an action under the FOIA, in which Plaintiff seeks access to records pertaining to the death of Deputy White House Counsel Vincent Foster maintained by Defendant, National Park Service. Plaintiff, Accuracy in Media, Inc., requests release of certain documents and seeks discovery to challenge the government's exemption claims. Plaintiff further requests that this Court conduct an *in camera* review of the withheld information to determine whether the information has been properly characterized as exempt under the Act. Defendant claims to have released all non-exempt information to Plaintiff. Defendant also maintains that the Court should not permit discovery or conduct an *in camera* review because the NPS conducted a good faith search for information relevant to Plaintiff's FOIA requests. Defendant asserts that since there are no factual disputes to be resolved, it is entitled to summary judgment.

By letter dated June 6, 1997, Plaintiff requested Defendant to release any documents and things which refer or related to (1) the investigation performed by the United States Park Police (Park Police), a branch of the NPS, into the death of Mr. Foster; (2) the decision of the Park Police to close the

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following Mr. Foster's death but that the remainder of the pages were properly withheld. *Id.* at 8-9.

investigation into the death of Mr. Foster and rule the death a suicide; (3) communications between the Park Police and other law enforcement agencies, including requests for assistance with the investigation; (4) communications between the Park Police and the White House, the Federal Bureau of Investigation (FBI), or the United States Secret Service or any employees thereof, relating to notification that Mr. Foster's body had been found; and (5) interviews of Park Police officers involved in the investigation of Mr. Foster's death, conducted by FBI investigators, committees or members of the United States Senate or House of Representatives, or the Office of the Independent Counsel (OIC). As Plaintiff did not receive any response to its request by September 9, 1997, Plaintiff sought declaratory and injunctive relief by Complaint filed September 12, 1997.

Thereafter, Defendant identified 481 pages of materials responsive to Plaintiff's FOIA request, 91 pages of which were released to Plaintiff on September 12, 1997. On October 10, 1997, the OIC issued its *Report on the Death of Vincent W. Foster, Jr. by the Office of Independent Counsel In re Madison Guaranty Savings and Loan Association*, concluding that Mr. Foster committed suicide on July 20, 1993 and releasing several Park Police officer names that had been previously withheld pursuant to Exemption 7(C). Accordingly, Defendant re-reviewed the information it previously identified as responsive and, on February 3, 1998, Defendant released another 377 pages of records and information; 193 pages were released in their entirety and 184 were released in redacted form. As there was some confusion as to whether some of the responsive materials were re-reviewed prior to the February 3rd release, these materials were sent to be reviewed by the OIC. As a consequence, an additional 15 pages were supplementally released on April 9, 1998. In total, Defendant released to Plaintiff approximately 470 of 481 pages of records and information identified as responsive to Plaintiff's FOIA request; about 184 pages of the documents were released in redacted form.

Defendant identified the records and information it withheld by the following categories: (1) "Results of witness interviews regarding events that took place after the death of Mr. Foster" and "[w]itness interview notes"; (2) "Description of evidence regarding events that took place following the death of Mr. Foster"; and (3) "Investigatory activities regarding events that took place after the death of Mr. Foster." Specifically, under these categories, Defendant withheld names, initials, badge numbers, telephone numbers, and other personal information regarding law enforcement and agency personnel as well as names, addresses, telephone and license plate numbers, and other personal information regarding witnesses and third parties. It also withheld photographs of Mr. Foster's body at Fort Marcy and at the autopsy. Defendant withheld this information pursuant to Exemption 7(C) after balancing the personal privacy interests of these individuals against the public's interest in the disclosure of the information. Pursuant to the OIC's recommendation, the government withheld 29 pages of materials in their entirety and information from 13 additional pages on the basis that the release of the information could reasonably be expected to interfere with the OIC's ongoing criminal investigation regarding events that took place at the White House following Mr. Foster's death.

In its motion for summary judgment, Defendant claims it properly redacted identifying information regarding law enforcement personnel, witnesses and third parties, including the Foster family, from various documents pursuant to Exemption 7(C) of the FOIA, which excludes information compiled for law enforcement purposes where the release of the information could constitute an unwarranted invasion of personal privacy. Defendant also maintains it properly withheld records and information pertaining to the OIC's ongoing investigation into events that occurred following Mr. Foster's death pursuant to Exemption 7(A) of the FOIA, which excludes information compiled for law enforcement purposes where the release of the information could interfere with law enforcement proceedings. Plaintiff disputes

Defendant's description of information withheld or redacted and the accuracy of Defendant's claims. In particular, Plaintiff claims Defendant improperly withheld the above-listed identifying information, photographs of Mr. Foster's body[2] and information regarding the investigation of Mr. Foster's death. Plaintiff further maintains that Defendant has failed to conduct an adequate search for documents responsive to Plaintiff's FOIA request.

II. Discussion

A. Summary Judgment

Under the FOIA, a district court conducts de novo review to determine whether the government may properly withhold the requested records under any of FOIA's nine exemptions. 5 U.S.C. §§ 552(a)(4)(B) & (b)(1)-(9). To sustain its burden of justifying nondisclosure of records under the FOIA, the government must submit affidavits or declarations describing the withheld material with reasonable specificity and the grounds for exemption. In order to withstand a motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue of material fact in dispute. Fed. R. Civ. P. 56(e). Where the pleadings and affidavits show that there is no genuine issue of fact and that the moving party is entitled to judgment as a matter of law, summary judgment is properly granted. *See id.*; *see also Alyeska Pipeline Serv. Co. v. Environmental Protection Agency*, 856 F.2d 309, 313-14 (D.C. Cir. 1988).

In opposing summary judgment, a party is not entitled to rely on the allegations of its complaint. Rule 56 provides that "[w]hen a motion for summary judgment is made and

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[2] The photographs include pictures taken at the autopsy and reveal the roof of Mr. Foster's mouth and tongue, as well as the exit wound. Plaintiff claims the significance of the photographs is that they would reveal the angle of the fatal shot and thus would reveal whether the wound was self-inflicted or not.

supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is genuine issue for trial." Fed. R. Civ. P. 56(e).

B. Freedom of Information Act

Plaintiff's claims arise under FOIA, 5 U.S.C. § 552. The FOIA provides a rule of general disclosure by government agencies upon request. Mandatory disclosure enables the public to gain access to government information so that it can review the government's performance of its statutory duties, thereby promoting governmental honesty. *EPA v. Mink*, 410 U.S. 73, 79-80 (1973). Accordingly, district courts have the authority to enjoin an agency from withholding agency records and to order the production of agency records where the agency improperly withholds agency records. *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 141 (1989); *Katz v. National Archives & Records Admin.*, 862 F. Supp. 476, 478 (D.D.C. 1994). However, an agency may withhold agency records which fall under one of the nine enumerated exemptions under the FOIA. *See* 5 U.S.C. § 552(b). The government has the burden to justify its withholding of documents pursuant to one or more of these exemptions. *Katz*, 862 F. Supp. at 478.

1. Exemption 7(C)

In this case, Defendant, a government agency, invoked the exemption set forth in 5 U.S.C. § 552(b)(7)(C) in support of its decision to redact information that it claims is personal to law enforcement personnel, agency employees, witnesses, private citizens and the Foster family in documents requested by Plaintiff. Defendant also invoked this exemption as the basis for withholding photographs of Mr. Foster's body. Exemption 7(C) permits the government to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement

records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 522(b)(7)(C).

a. Personal Information

Plaintiff does not challenge the propriety of withholding the personal information of law enforcement officers, witnesses and the Foster family. *See Lesar v. Dep't of Justice*, 636 F.2d 472, 488 (D.C. Cir. 1980) (stating that it is well-established that third parties interviewed and third parties whose names surface in a criminal investigation have a privacy interest in personal information that renders this information excludable under Exemption 7(C) in order to prevent embarrassment and harassment and to enable law enforcement officers to conduct an investigation); *accord Kuffel v. United States Bureau of Prisons*, 882 F. Supp. 1116, 1122 (D.D.C. 1995); *Watson v. Dep't of Justice*, 799 F. Supp. 193, 196 (D.D.C. 1992); *see also Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1282 (D.C. Cir. 1992) (finding that law enforcement officials have a substantial privacy interest in concealing their identity); *accord Putam v. United States Dep't of Justice*, 880 F. Supp. 40, 41-42 (D.D.C. 1995). Plaintiff does challenge, however, Defendant's description of the information redacted. Plaintiff's Statement of Genuine Issue in Opposition to Motion for Summary Judgement ¶ 1. As an example of the unreliability of Defendant's characterizations, Plaintiff offers the report of a Park Police officer in which he says Mr. Foster's tongue and part of his soft pallet were removed prior to the arrival of the Park Police at the autopsy. This information was redacted from the copy of the report produced by Defendant but was not referred to in Defendant's list of withheld information. Plaintiff thus urges this Court to review the withheld and redacted material to ensure that it has been properly exempted.

Agency affidavits are presumed to be made in good faith and this presumption can only be overcome by evidence of bad faith. *Dow Jones v. United States Dep't of Justice*, 880 F. Supp. 145, 148-49 (S.D.N.Y. 1995). The mere accusation

than [sic] an agency conducted its search for materials responsive to a FOIA request in bad faith is not enough to compel a district court to review the information withheld. *Id.* However, the agency's description of withheld materials should be reasonably detailed. *Id.* "If the Government fairly describes the content of the material withheld and adequately states its grounds for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the Government's position." *Id.* (quoting *Carney v. United States Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994)).

Although in the instance recounted by Plaintiff, the redacted information does not precisely fit the description given by Defendant, this instance does not amount to tangible evidence of bad faith. In contrast, the fact that Defendant repeatedly re-reviewed the documents in its possession as information was revealed to the public and then disclosed additional information to Plaintiff refutes Plaintiff's claims of agency bad faith. Accordingly, the Court finds the agency's claimed exemption of this information is proper.

b. **Photographs of Mr. Foster's Body**

The photographs of Mr. Foster's body should not be disclosed to Plaintiff. Mr. Foster's family members have a legitimate and substantial privacy interest in the photographs. Although the public has a well-established interest in monitoring the government's administration of justice, after weighing the Foster family's significant privacy interest against the potential ability of the photos to reveal the nature of the fatal wound to Mr. Foster, the Court finds that the balance weighs in favor of the Foster family.

Defendant withheld photographs of Mr. Foster taken at the autopsy on the basis that Mr. Foster's family has a privacy interest in them. Plaintiff disputes the claim of a third-party privacy interest. Instead, Plaintiff characterizes authority on the issue as supporting its proposition that an individual has a privacy interest only in matters concerning oneself. For

instance, Plaintiff cites the discussion in *Reporters Committee* concerning two of the definitions of "privacy" in the context of the FOIA: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *United States Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 762 (1989) (citation omitted). Plaintiff contends that this definition limits the privacy interest to these two contexts. However, the decision states that there are *at least* two different kinds of interests consumed under the rubric of "privacy," thus signaling that this accounting is not exhaustive. *Id.* In *Reporters Committee*, where a news reporter and journalists' association sought the criminal record of a member of a family that the government identified as being tied to organized crime, the privacy interest at issue belonged to the subject of the inquiry. *Id.* at 757. The validity of third-party privacy interests was not considered by the Court in that case.

In another case dealing with privacy interests under the FOIA, the court considered whether the government could properly withhold voice recordings of the Challenger space shuttle astronauts taken on the date of the accident in which they were killed. *New York Times Co. v. NASA*, 782 F. Supp. 628 (D.D.C. 1991). The court found that consideration of the Challenger families' privacy interest was appropriate.[3] *Id.*

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[3] Although the case concerned Exemption 6 of the FOIA, Defendant cites *New York Times* in support of its proposition that the court has recognized the potential of a family's privacy right in matters regarding a member of that family. The purpose of Exemption 7(C), like that of Exemption 6, is to guard against unnecessary disclosure of files "which would contain 'intimate details' of a 'highly personal' nature." *New York Times*, 782 F. Supp. at 631 (citing *Getman v. NLRB*, 450 F.2d 670, 675 (D.C. Cir. 1971)); *see Hale v. United States Dep't of Justice*, 973 F.2d 894, 900 (10th Cir. 1992) (stating exemption 7(C) "reflects Congress' desire to preserve confidentiality and personal privacy"). Thus, the conclusion reached in *New York Times* and *Badhwar* that families have privacy interests under Exemption 6 of the FOIA applies to Exemption 7(C) as well.

On remand, the district court explicitly found "that the privacy interest asserted on behalf of the Challenger families [was] a valid and substantial one." *New York Times v. NASA*, 920 F.2d 1002 (D.C. Cir. 1990); *see Badhwar v. United States Department of Air Force*, 829 F.2d 182, 185-86 (D.C. Cir. 1987) (finding a family member privacy interest in the autopsy records of deceased aircraft pilots and remanding the case for a determination of whether disclosure would be a "clearly unwarranted invasion of personal privacy"). Plaintiff seeks to avoid the clear result of the *New York Times* decision by accusing the court of creating a "family grief" exemption to the FOIA and thus committing an abuse of judicial power. Plaintiff claims there is no room in the definition of "privacy" for a family's interests under the Supreme Court's ruling in *Reporters Committee*. As discussed above, the *Reporters Committee* case does not touch upon this issue.

In *Hale*, the United States Court of Appeals for the Tenth Circuit found that families have a privacy interest in photographs of a deceased victim under Exemption 7(C) of the FOIA. *Hale v. United States Dep't of Justice*, 973 F.2d 894 (10th Cir. 1992). The court held that disclosure of the photographs would "constitute an unwarranted invasion of personal privacy" and therefore found them properly withheld under Exemption 7(C). *Id.* Plaintiff attempts to discredit the decision because the opinion does not cite *Reporters Committee* or other authority cited therein. Nonetheless, the decision is consistent with prior case law, as the court concluded that the victim's family does have a personal privacy interest in the photographs. *Hale*, 973 F.2d at 902.

In *Dow Jones v. United States Department of Justice*, 880 F. Supp. 145 (S.D.N.Y. 1995), as well, the court recognized the privacy interest of a deceased's family. In that case, a note was at issue that Mr. Foster apparently wrote prior to his death. The court presumed the Foster family had a privacy interest in the note. *Id.* at 152. However, the court ruled that the public's interest in viewing the note was substantial and outweighed that interest. *Id.* Thus, the court

granted the plaintiffs' motion for summary judgment in part and enjoined the Department of Justice from withholding circulation of copies of the note. *Id.* at 153.

Under the foregoing authority, the Court finds that the family of Mr. Foster has a legitimate and substantial privacy interest in the photographs taken at the autopsy. The Supreme Court did not specifically address the issue in *Reporters Committee* and to date has not done so in any other opinion. However, the United States District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit, as well as other district courts, have declared that such an interest exists in circumstances such as the one before this Court.

A finding of a privacy interest in the photographs does not end the Court's inquiry. The next step in the Court's analysis is to determine whether the public interest in the photographs outweighs the Foster family's privacy interest. Once it is determined that there is a privacy interest in information, it must be determined by reasonable specificity that the public interest will be served by release of the information. To satisfy this requirement, "the person requesting the information must identify with reasonable specificity the public interest that would be served by release." *Hale*, 973 F.2d at 900. The Supreme Court ruled in a FOIA case that "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within [the] statutory purpose [of facilitating full agency disclosure]. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Reporters Comm.*, 489 U.S. at 773.

Defendant resists disclosure of the photographs on the basis that the Foster family's privacy interest is not outweighed by the public's interest in seeing them. Defendant posits that no public benefit would be served by the release of the photographs of Mr. Foster's body.

Defendant maintains that the privacy interest involved in this case is even greater than that identified in *Reporters Committee* because of the sensitive and graphic nature of the photographs. Further, Defendant warns that the release of the photographs will cause Mr. Foster's surviving family members further grief and anguish.

Plaintiff insists that even if there is a legitimate family privacy interest in the photographs of Mr. Foster's body, this interest is outweighed by the public's interest in monitoring the government's administration of justice. Plaintiff believes that the release of the photographs will aid the public in this goal. In support of its position, Plaintiff cites the D.C. District Court's opinion in *Outlaw v. United States Department of the Army*, 815 F. Supp. 505 (D.D.C. 1993), in which Judge Oberdorfer found that a murder victim's family privacy interest in photographs showing the victim's fatal wounds was outweighed by the public's interest in determining whether the person convicted of the murder had actually committed the act. *Id.* at 506. In reaching his decision to release the photographs, Judge Oberdorfer said that even a substantial privacy interest could be outweighed by the public interest in the administration of justice. *Id.* at 506-07. Plaintiff maintains the photographs should be disclosed due to alleged inconsistencies concerning Mr. Foster's fatal wounds in the investigative and official reports previously released by the government[4], an alleged alteration in a doctor's report, a claimed false implication by Independent Counsel Kenneth W. Starr (Starr) that the Park

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[4] Plaintiff points out that page 1 of the report completed by Dr. Donald Haut, the medical doctor who examined Foster's body, said that the death shot was "mouth-head" but page 2 of the report said that the shot was "mouth to neck." Plaintiff's Ex. 3 at 1-2. The Senate Banking Committee quoted both conclusions of the Haut Report but did not note any inconsistency between them. Plaintiff's Ex. at 18 & n.57. The official autopsy report concluded that the cause of death was a "mouth to head" shot and Independent Counsels Robert B. Fiske, Jr. and Kenneth W. Starr reached the same conclusion. Plaintiff's Ex. 5 at 27 n. 57, 31.

Police observed the entire autopsy, and the possible missing status of other body photos. Moreover, Plaintiff suggests that the high governmental position of the former deputy White House counsel and involvement of federal law enforcement offices adds weight to the public interest in this case.

The Court finds that although the propriety of the government's administration of justice is a legitimate interest, the Foster family has a stronger privacy interest in the photographs of Mr. Foster's body. There is no doubt that the family would suffer additional grief from the release of the photos, and likely further harassment. Additionally, assuming *arguendo* that Plaintiff's allegations of inconsistencies and impropriety are true, the only possible resolution that the photographs could effect is to reveal the nature of the fatal wounds. The photographs would have no impact on Plaintiff's other allegations. For these reasons, the Court finds that under the relevant case law discussed above, the Foster family's privacy interest outweighs the public's legitimate interest in monitoring the administration of justice. Accordingly, the Court finds that the photographs of Mr. Foster's family were properly withheld pursuant to Exemption 7(C) of the FOIA.

2. Exemption 7(A)

Defendant claimed authority to redact or withhold information pursuant to Exemption 7(A) of the FOIA on the ground that the information concerns the OIC's ongoing investigation into the events following the death of Mr. Foster. Exemption 7(A) permits the government to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The exemption is applicable where (1) a law enforcement proceeding is pending or prospective and (2) release of information about the law enforcement proceeding could reasonably be expected to cause some

articulable harm. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).

Defendant maintains the first prong of the test is met because Independent Counsel Starr is conducting an investigation pursuant to his jurisdiction to investigate violationis of federal criminal law into the events following Mr. Foster's death. *See* 28 C.F.R. §§ 600 and 603.1 (1994). Although the OIC has concluded the investigation into Mr. Foster's death, the Independent Counsel states that the ongoing investigation concerns matters such as the handling of documents in Mr. Foster's White House office.[5] Plaintiff has not denied that such an investigation is proceeding. Defendant states that the second prong of the test is also satisfied in this case because the release of witness statements and evidence concerning the OIC's ongoing investigation would compromise the Independent Counsel's ability to effectively conduct the investigation. Defendant warns, for example, that the release of such information could taint the statements of witnesses who have yet to be interviewed, thus impairing the acquisition of these individuals' own observations and knowledge.

Plaintiff maintains that a decision regarding the propriety of the government's Exemption 7(A) claim would be premature at this time because Defendant may possess other documents that contain information that would be useful in assessing this claim. Therefore, Plaintiff requests further discovery before the Court proceeds in addressing this issue. In support of this contention, Plaintiff claims that there are unresolved issues surrounding the identification of the official

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[5] Counsel for Defendant and Plaintiff, as attorneys and officers of the Court, have a continuing obligation during the pendency of this case to inform the Court if any material facts underlying the case or presented to the Court in declaratory format change. *See* Fed. R. Civ. P. 26(e). Since counsel for neither party has advised the Court that the investigation into the events following Mr. Foster's death has been concluded, the Court presumes it is ongoing.

death gun; it is unclear whether the Park Police identified or produced its officers' handwritten notes of the investigation; Park Police telephone records and tape recordings were not produced to the Plaintiff, although they were requested; and no fingerprint report was produced, although a Park Police report indicates that Mr. Foster's car was dusted for prints. Plaintiff also reasserts its allegations that there are inconsistencies in the previously disclosed investigative and government reports concerning the type of wound suffered by Mr. Foster and the individuals present during the autopsy of Mr. Foster's body, and that there were photographs taken upon discovery of Foster's body which are now missing.

Plaintiff does not directly refute Defendant's application of the *Robbins* test, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), and fails to overcome Defendant's presumption of good faith under *Robbins*. In *Robbins*, the Supreme Court upheld the application of Exemption 7(A) to the statements of potential witnesses, thus allowing the National Labor Relations Board to withhold the content of the statements until the conclusion of the Board's hearing for which they were collected. *Robbins*, 437 U.S. at 236. The Court reasoned that disclosure of this information might lead to the intimidation of witnesses "in an effort to make them change their testimony or not testify at all" and could provide suspected violators with notice of the NLRB's case. *Id.* at 239-41. Although there is no hearing or trial imminent in this case, disclosure of witnesses' statements and reports acquired by law enforcement personnel may impede the OIC's investigation into events following Mr. Foster's death.

In another case arising from events surrounding Mr. Foster's death, in which private parties sought access to documents concerning the death of the former deputy White House counsel, the defendants withheld reports prepared by the Park Police and FBI pursuant to Exemption 7(A). *Dow Jones*, 880 F. Supp. at 148-49; *see Accuracy in Media*, Civ. Action No. 97-2108, at 1 (seeking documents from the United States Secret Service that were withheld pursuant to

Exemption 7(A)). The government submitted a declaration stating that "public disclosure of information found in the Reports, such as statements by interviewees and the facts gathered and the conclusions reached as to certain matters, might affect the testimony or statements of other witnesses and could severely hamper the Independent Counsel's ability to elicit untainted testimony." *Dow Jones*, 880 F. Supp. at 150. The court accorded the statement full credibility pursuant to the proposition that agency affidavits are presumed to be made in good faith; this presumption may be overcome only by "tangible evidence of bad faith, not mere conjecture that representations made by the agency are incredible." *Id.* The court further reaffirmed that "[a]n agency affidavit or declaration providing reasonably detailed explanations why withheld documents fall within a claimed exemption is sufficient to sustain the agency's burden." *Id.*; *see Carney v. United States Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). The court found the following averment of document contents met this test: witness interviews by the Park Police and FBI; reports of investigative action taken by the Park Police in connection with Mr. Foster's death; copies of documents found in Mr. Foster's possession; an autopsy report; documents relevant to the investigation obtained from the White House; and computer-generated documents. *Id.* The court also found the government's warning that release of the documents could impede its ongoing investigation sufficient. *Id.* Therefore, the district court held that the potential harm enunciated in the declaration warranted exemption from disclosure under Exemption 7(A). *Id.*

As Defendant fairly described the content of the material withheld and adequately stated its ground for nondisclosure, those grounds are reasonable and consistent with Exemption 7(A) and there is no reason to question the agency's good faith, the Court will accord Defendant's affidavits and declarations full credibility. *See id.* at 150. The government properly compiled an index of materials responsive to Plaintiff's FOIA request and, as in *Dow Jones*, adequately described the contents of the material withheld or redacted

and cited the grounds for its actions. Despite Plaintiff's allegations to the contrary, there is no tangible evidence to support its claims that the agency conducted its search or withheld information in bad faith. It is a reasonable concern that the release of information regarding the OIC's investigation into events following Mr. Foster's death could interfere with the ongoing process. Accordingly, the Court finds Defendant properly withheld this information pursuant to Exemption 7(A) of the FOIA.

3. In Camera Review

This Court need not conduct an *in camera* review in this case because the issues before the Court can be, and were, resolved without the benefit of such procedure. Defendant has properly cited the statutory bases on which it withheld documents from Plaintiff. Also, no evidence has been offered to show that Defendant failed to conduct an adequate search for records responsive to Plaintiff's FOIA request. Additionally, there was no bad faith on the part of the agency in describing the information withheld as personal under Exemption 7(C). For these reasons, Defendant's [sic] request that this Court conduct an *in camera* review is denied.

Plaintiff asserts that *in camera* review is necessary to assure that the government has adequately described the contents of the withheld and redacted material and properly cited FOIA exemptions for its decisions. A district court judge has discretion in deciding whether to grant a request for *in camera* review. *Lam Lek Chong v. DEA*, 929 F.2d 729, 735 (D.C. Cir. 1991); *Kay v.FCC*, 976 F. Supp. 23, 33 (D.D.C. 1997). Such procedure, however, is the exception and not the rule. *Robbins*, 437 U.S. at 224; *see Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir 1992) (*in camera* review, "though permitted under FOIA and sometimes necessary, is generally disfavored"); *Doherty v. United States Dep't of Justice*, 775 F.2d 49, 52-53 (2d Cir. 1985) (district court "should restrain its discretion to order in camera review" where the "Government's affidavits on their face indicate that the documents withheld logically fall within the

claimed exemption and there is no doubt as to agency good faith"); *Dow Jones*, 880 F. Supp. at 151 (*in camera* review unnecessary "when the plaintiff seeks such review merely to determine if a claimed exemption applies"). *But see Accuracy in Media*, Civ. Action No. 97-2108, at 4 (granting *in camera* review because "the declarations describing the redacted material use general language that makes it as difficult for the Court as it has been for AIM to ascertain from the declarations alone whether the government has properly withheld or redacted the material").

Plaintiff maintains that upon resolution of the issue as to the reasonableness of the government's search for responsive documents, *in camera* review should be undertaken by the Court. The procedure will allow the Court to view all the withheld or redacted documents with greater assurance that it has the information required to examine the claims of the NPS and OIC. *In camera* review is necessary, according to Plaintiff, because "Defendant has failed to prove its statement that 'plaintiff has all known documents responsive to its FOIA request' with the exception of information exempted from disclosure." Plaintiff's Memorandum of Law in Opposition to Motion for Summary Judgment at 37.

Plaintiff misstates Defendant's burden. An agency search for records is "adequate" when the agency shows that it made "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). As discussed above, Defendant is granted a presumption of good faith in its statements that it has disclosed all of the non-exempt material responsive to a FOIA request absent evidence contradicting the presumption. Defendant has sustained its burden in this case by detailing its search for responsive documents, citing exemptions as a basis for its actions, and disclosing information that is not exempt. *See* Def's Memorandum in Support of its Motion for Summary Judgement at 6-10. As this Court finds that

Defendant also sustained its burden in describing the contents of withheld and redacted information, there is sufficient basis to determine whether the cited FOIA exemptions have been properly claimed without conducting *in camera* review.

4. Discovery by Plaintiff

Plaintiff seeks permission to conduct further discovery to determine the adequacy of Defendant's search for documents. The Court will deny this request. Discovery is generally inappropriate in the context of FOIA cases. *Center for Nat'l Sec. Studies v. Office of Indep. Counsel*, No. 91-1691, Slip Op. at 3 (D.D.C. Mar. 2, 1993); *see Williams v. NPS*, No. 90-2299, Slip Op. at 8 (D.D.C. Aug. 6, 1991) ("[d]iscovery in FOIA cases is extremely limited"). Moreover, discovery is properly denied if the court is satisfied from the agency's affidavits that no factual disputes remain. *See Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1979); *Stone v. NPS*, No. 87-1346, Slip Op. at 2 (D.D.C. Jan. 19, 1988). When a plaintiff's request for discovery arises out of doubts as to the adequacy of an agency's search for documents, discovery should be denied if the affidavits submitted by the agency are sufficiently detailed and submitted in good faith. *See SafeCard Serv. v. SEC*, 926 F.2d 1197, 1200-02 (D.C. Cir. 1991) (finding denial of discovery as to adequacy of search not in error where agency's affidavits were sufficiently detailed); *Military Audit Project v. Casey*, 656 F.2d 724, 751 (D.C. Cir. 1981) (refusal to permit discovery proper where plaintiffs failed to raise "substantial questions concerning the substantive content of the [defendant's] affidavits"); *Hunt v. United States Marine Corp*, 935 F. Supp. 46, 50 (D.D.C. 1996) (discovery denied where "defendants have met their burden of showing that they have made a good faith effort to conduct a search for the requested records, using methods reasonably expected to produce the desired information").

Plaintiff has offered speculation that Defendant's search for responsive records was not adequate and claims there are inconsistencies in the previously disclosed materials. In support of its contention, Plaintiff again points to the

allegedly inconsistent records and missing officers' handwritten notes, telephone records, tape recordings and fingerprint report. Plaintiff has not, however, offered evidence demonstrating that further discovery is warranted. The adequacy of an agency's search is not put in question merely by the requester claiming that other records "must exist" due to the perceived importance of the subject matter; "hypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of the agency's search." *Ogelsby v. United States Dep't of the Army*, 920 F.2d 57, 67 n. 13 (D.C. Cir. 1990). Similarly, "[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." *Steinberg v. United States Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994) (quoting *SafeCard*, 926 F.2d at 1201). No evidence has been offered in this case to rebut the presumption of good faith that the government's search efforts are granted and Defendant detailed the multiple reviews it conducted to identify responsive materials. Also, Plaintiff's concerns as to the success of the search conducted by the government are insufficient to justify further discovery in this case. Accordingly, Plaintiff's request is denied.

III. Conclusion

For the reasons discussed in this Opinion, the Court finds that the NPS properly withheld the disputed information under the exemptions of the FOIA. Because the Court finds that there is no evidence of agency bad faith in this case, it holds that Defendant properly withheld personal information of law enforcement officers, witnesses and the Foster family pursuant to Exemption 7(C) of the FOIA. Additionally, Defendant adequately described other information withheld under Exemption 7(C). Defendant also properly withheld photographs of Mr. Foster's body pursuant to Exemption 7(C) of the FOIA. After balancing the competing interests of the Foster family and the public, the Court finds the Foster family's privacy interest is stronger and, therefore, the

photographs need not be disclosed. The Court also finds that the release of documents related to the OIC's continuing investigation into the events following the death of Mr. Foster could reasonably be expected to impede that inquiry. Therefore, Defendant properly withheld information regarding the investigation of the events following Mr. Foster's death pursuant to Exemption 7(A) of the FOIA. The foregoing issues can be, and were, resolved without benefit of *in camera* review. As there is no tangible evidence of agency bad faith in this case, the Court, in its discretion, will not grant Defendant's [sic] request for *in camera* review. Plaintiff's request for further discovery is denied on this ground as well. Because the pleadings and affidavits show that there is no genuine issue of fact and Defendant is entitled to judgment as a matter of law, the Court will grant Defendant's Motion for Summary Judgment and dismiss this case. An Order will accompany this Opinion.

November 12th 1998

Thomas F. Hogan
United States District Court

APPENDIX F
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 97-2109

ACCURACY IN MEDIA, INC.,

Plaintiff,

v.

NATIONAL PARK SERVICE,

Defendant.

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby **ORDERED** that Defendant's Motion for Summary Judgment is **GRANTED**; and it is further **ORDERED** that Civ. No. 95-2109 is **DISMISSED**.

November 12th 1998

Thomas F. Hogan
United States District Court